Supreme Court, U.S.
FILED

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No. 02 304

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In The

# Supreme Court of the United States

FREDERICK C. FERMIN,

*Petitioner,*

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## SUPPLEMENTAL APPENDIX

FREDERICK C. FERMIN
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26 pp

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **FREDERICK C. FERMIN,** | § | |
| **Plaintiff,** | § | |
| | § | |
| **v.** | § | **CAUSE NO.** |
| | § | **SA-00-CA-1288-PM** |
| **LARRY G. MASSANARI, ACTING COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,** | § | |
| | § | |
| | § | |
| | § | |
| **Defendant.** | § | |

**MEMORANDUM DECISION AND ORDER**

(Filed Jul 23, 2001)

Pursuant to the consent of the parties to disposition before a United States Magistrate Judge[1] and consistent with the authority vested in United States Magistrate Judges under the provisions of 28 U.S.C. § 636(c) and rule 1(i) of the Local Rules for the Assignment of Duties to United States Magistrates, effective January 1, 1994, in the Western District of Texas, the following Order is entered.

## I. JURISDICTION

The Court has jurisdiction pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3).

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[1] Docket nos. 14, 22, and 23.

## II. ADMINISTRATIVE PROCEEDINGS

This is an action to review a decision of the Commissioner of Health and Human Services under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Plaintiff *pro se* Frederick C. Fermin instituted this action pursuant to Title 42 U.S.C. §§ 405(g) seeking a review of the determination of Larry G. Massanari, the Acting Commissioner of the Social Security Administration, that plaintiff's application for social security benefits filed in 1987 could not be reopened for good cause.[2] The instant case is one of a long series of Social Security applications and challenges that have been filed by Fermin.[3] The present dispute regarding the 1987 application began on April 14, 1995, when Fermin filed an application for benefits based on a claim of eligibility as of January 1005 due to the death of his wife.[4] Fermin's application stated:

> I retired from civil service 07/01/57. I retired due to a disability. My annuity was computed under the guaranteed minimum 40 percent of salary

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[2] Docket no. 1, exhibit 4 at 2. The Administrative Law Judge's ("ALJ") December 3, 1998 decision is not in the case transcript. However, Fermin has attached the decision as an exhibit to his original complaint and to his motion for summary judgment, docket no. 28, exhibit 1. When referring to the ALJ's decision, the Commissioner also cites to exhibit 4 as attached to the original complaint. Because both sides agree that exhibit 4 to the complaint is an accurate version of the decision, all citations to the December 3, 1998 decision in this Order are to exhibit 4 to the complaint.

[3] The transcript indicates that Fermin filed an application[ ] for Social Security benefits at least as early as 1961. Transcript at 98. It appears that other applications were filed in 1968, 1973, 1987, and 1995.

[4] Transcript at 439; exhibit 4 at 1.

> provision thus OPM did not use my military service. However, I elected the reduced annuity with survivor benefits in order to provide for surviving spouse benefits upon my death. Therefore I could not be granted military service credits for retirement purposes even though my spouse could not be paid benefits by OPM until I died. However, my wife is now deceased. Thus I feel that Social Security can now use that military service credit since the surviving annuity will never be paid.[5]

The Social Security Administration denied the application both initially and upon reconsideration,[6] finding that Fermin's request was a duplicate of an earlier claim and raised no new issues.[7] The initial denial also stated that because Fermin's military service was used to compute the survivor annuity, it could never be used by the Social Security Administration in determining Fermin's eligibility for benefits.[8] The reconsideration of the denial stated that Fermin only had sixteen of the thirty-six calendar quarters need for eligibility for social security benefits and that, based on Social Security Ruling ("SSR") 61-49, his military service was not available to him even though his wife had died and her survivor annuity would never be paid.[9]

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[5] Transcript at 441.

[6] *Id.* at 443 and 449.

[7] *Id.* at 443.

[8] Transcript at 453.

[9] *Id.* at 454.

Fermin sought an administrative hearing, arguing that the Social Security Administration had failed to consider 42 U.S.C. § 417(f)(2) which superseded SSR 61-49.[10] On March 18, 1997, the ALJ dismissed Fermin's request for a hearing because the decision on Fermin's 1987 application for benefits was *res judicata* as to the 1995 claim and there was "no clerical error or error on the face of the evidence on which such decision was made."[11] The ALJ found that the 1995 case involved the "rights of the same claimant on the same facts and on the same issues which were decided in the final and binding decision dated August 9, 1998[.]"[12] The Appeals Council denied plaintiff's request for review, making the determination of the ALJ the final decision of the Commissioner.[13] Fermin appealed the Commissioner's decision, and on February 11, 1998, the District Court, adopting[14] the magistrate judge's memorandum and recommendation, held that the matter be remanded for consideration of whether Fermin was competent to "understand the administrative process and to appeal the denial of his [1987] application for retirement benefits."[15] The District Court also found that

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[10] *Id.* at 456.

[11] *Id.* at 472.

[12] *Id.*

[13] *Id.* at 479.

[14] *Id.* at 517. The initial report of the Commissioner's 1995 decision was filed under cause no. SA-97-CA-1269-HG and the District Court's Order adopting the magistrate's memorandum is at docket no. 14. The magistrate's memorandum is at docket no. 12. For convenience the citations will be to the transcript pages containing the magistrate's memorandum, pages 505-513 and containing the District Court's order, page 517.

[15] Transcript at 511.

Fermin had not stated a claim under 42 U.S.C. § 1983 because he had not named as defendant the state agency that participates in Social Security determinations and the Commissioner's actions were not governed by that statute.[16]

On August 11, 1998, the ALJ conducted a hearing on the remanded case and issued a decision on December 3, 1998.[17] The ALJ made two determinations. First, the ALJ determined that Fermin was competent to understand the administrative procedures and appeal process when his 1987 request for benefits was under consideration and that there was no good cause to reopen the 1987 application for benefits.[18] The ALJ also determined that the first hearing on Fermin's 1995 application was improperly dismissed because Fermin had established that he was entitled to Social Security retirement benefits as of February 1995. The instant appeal is Fermin's challenge to the AL[J]'s December 3, 1998 decision.

## III. ISSUES

1. Whether substantial evidence supports the Administrative Law Judge's decision.

2. Whether the decision comports with relevant legal standards.

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[16] *Id.* at 507 and n. 1.

[17] Exhibit 4.

[18] *Id.* at 2.

## IV. STANDARD OF REVIEW

In reviewing the Commissioner's decision denying social security benefits, the Court is limited to a determination of whether the decision is supported by substantial evidence and whether the Commissioner applied the proper legal standards in evaluating the evidence.[19] Substantial evidence is more than a scintilla, less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[20] It must do more than create a suspicion of the existence of the fact to be established but "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary evidence.[21] In applying the substantial evidence standard, the Court must carefully examine the entire record but must refrain from reweighing the evidence or substituting its judgment for that of the Commissioner.[22] Conflicts in the evidence are for the Commissioner and not the courts to resolve.[23] If the Commissioner's findings are supported by substantial evidence, they are conclusive and must be affirmed.[24]

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[19] *Marcello v. Bowen*, 803 F.2d 851, 853 (5th Cir. 1986) (retirement benefits); *see Martinez v. Chater*, 64 F.3d 172, 173 (5th Cir. 1995) (disability benefits).

[20] *Ripley v. Chater*, 67 F.3d 552, 555 (5th Cir. 1995); *Marcello*, 803 F.2d at 853.

[21] *Abshire v. Bowen*, 848 F.2d 638, 640 (5th Cir. 1988).

[22] *Ripley*, 67 F.3d at 555; *Marcello*, 803 F.2d at 853.

[23] *Martinez*, 64 F.3d at 174.

[24] *Martinez*, 64 F.3d at 173.

## V. ALJ'S FINDINGS AND PLAINTIFF'S CONTENTIONS

In determining that Fermin was competent to understand the procedures affecting his 1987 application for benefits, the ALJ found that during the August 11, 1998 proceeding, Fermin was able to recite the administrative process and fully understand his actions regarding the 1987 application.[25] The ALJ considered Fermin's testimony that he understood the process and that he did not appeal the Commissioner's 1988 decision because he believed it would do no good.[26] The ALJ found that Fermin, acting *pro se*, was "extremely knowledgeable and capable."[27]

With regard to Fermin's entitlement to Social Security retirement benefits, the ALJ explained that in 1987, Fermin had applied for such benefits.[28] To be entitled to retirement benefits based on his birth year of 1925, Fermin was required to have thirty-six quarters of coverage but the Social Security Administration determined that he only had sixteen.[29] The ALJ found Fermin had argued that his World War II military service from March 1941 to September 1945 and May 1946 to February 1947 could be used as wage credits for the missing twenty quarters.[30] According to the ALJ's discussion, Fermin had filed for a civil service annuity beginning in 1957.[31] Although his

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[25] Transcript at 2.

[26] Transcript at 2.

[27] *Id.*

[28] *Id.* at 3.

[29] *Id.*

[30] *Id.*

[31] *Id.*

military service was not used to compute the amount of his annuity, his military service was used for computing his wife's survivor's annuity which he had selected.[32] On that basis, the ALJ noted, a 1987 reconsideration letter stated that the Social Security Administration was barred from using Fermin's military service to grant him the additional quarters he needed to qualify for benefits.[33] Therefore, Fermin's 1987 application was rejected.[34] In addition, the reconsideration letter had stated that even if his military service could be used, Fermin would only receive nineteen of the twenty quarters he needed for retirement benefits.[35] The ALJ noted a 1995 reconsideration letter which cited SSR 61-49 as a basis for denying his 1995 application and that his request for a hearing was dismissed based on the doctrine of *res judicata*.[36]

The ALJ found that the 1987 reconsideration letter had failed to consider Fermin's military service from May 1946 to February 1947 which would increase his quarters to twenty-three.[37] In addition, the ALJ found that the hearing on the 1995 application was improperly dismissed on the basis of *res judicata* because an important fact had changed in Fermin's situation.[38] In that regard, the ALJ found that because Fermin's wife had died on January 24, 1995, the survivor's annuity option terminated the last

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Transcript at 3.

[36] *Id.*

[37] *Id.* at n. 3.

[38] *Id.* at 4.

day of January 1995.[39] Accordingly, because Fermin satisfied the Social Security Act and the Code of Federal Regulations, "namely that no pension or compensation is payable to the wage earner based on his military service as of February 1995," the ALJ found that Fermin had thirty-six quarters of coverage and was entitled to retirement benefits as of that date.[40]

Construing *pro se* plaintiff's complaint and briefs liberally, Fermin raises a variety of claims. Fermin appears to challenge a 1975 decision regarding an application for disability benefits,[41] but the undersigned will not address such a challenge because the 1975 decisions was not in the scope of the District Court's remand, was not considered by the ALJ,[42] was finally resolved over twenty-five years ago, and is not now subject to being re-litigated before the undersigned. Fermin also appears to reurge the claim for compensation under 42 U.S.C. § 1983. This claim for compensation will not be reconsidered by the undersigned. The District Court in its previous order[43] held that it did not have jurisdiction over such a claim because

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[39] *Id.*

[40] *Id.*

[41] Docket no. 21 at 2.

[42] The record of the August 11, 1998 hearing shows that Fermin testified he was seeking benefits from the time of his wife's death and admits that he did not qualify for benefits before her death. Transcript at 349 and 350. He did not argue that he was entitled to benefits retroactive to 1973. In addition, plaintiff's 1995 application for retirement benefits states that he is seeking benefits beginning with January 1995. *Id.* at 440.

[43] Transcript at 517.

§ 1983 does not apply to decisions made by the Commissioner and the section provides for compensation for state agency violations, but Fermin has sued no state agency.[44]

Fermin appears to challenge the ALJ's finding that he was competent to understand the administrative and appeals process regarding his 1987 application for benefits.[45] He also contests the ALJ's finding[46] that

> The military service was used by another government agency to establish a survivor's option for his wife. This prevented its use as wage credits to establish insured status for the wage earner.[47]

Fermin further argues that the ALJ failed to provide him with proper notice of the deadline for filing exceptions to the ALJ's decision on remand and that the Appeals Council erred in not reopening the ALJ's December 1998 decision based on new and material evidence.[48] These challenges and arguments are the subject of this Order.

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[44] *Id.* at 507.

[45] Docket no. 21 at 5, ¶ 1. Although Fermin does not specifically argue that the ALJ erred in determining that he was competent to understand the 1987 application proceedings, he does state that he "was and is suffering from chronic paranoid schizophrenia.["] *Id.* The Court liberally construes this allegation to be a contest of the ALJ's competency finding.

[46] Docket no. 21 at 5, ¶ 3.

[47] Exhibit 4 at 5.

[48] *Id.* at 6, ¶ 6; docket no. 1 at ¶ 3.

## VI. ARGUMENTS AND CONCLUSIONS OF LAW

### A. The ALJ's competency findings are in error

Fermin challenges the ALJ's finding that he had the ability to understand the administrative and appeals process as it related to Fermin's 1987 application for benefits and that there was no basis for reopening that decision.[49] The record of the August 11, 1998 hearing reflects that Fermin understood the purpose of the hearing was to determine his ability to understand the appeals process.[50] He understood that he need thirty-six quarters of coverage to qualify for benefits.[51] Fermin was able to recall the events surrounding the decision regarding his 1987 application for benefits and that the ALJ had found he only had sixteen quarters of coverage.[52] Fermin articulated his argument that his military service would provide him with an additional twenty plus quarters of coverage.[53] Fermin testified that he filed the 1987 application for benefits and that he himself asked for a reconsideration of the initial denial and requested an administrative hearing.[54] He understood that after the ALJ issued a decision, the Appeals Council considered the matter at his request.[55] When asked why he did not appeal the Appeals Council decision, Fermin stated that he was hospitalized for alcoholism during the sixty day period for filing the

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[49] Exhibit 4 at 5, ¶¶ 9 and 10.

[50] Transcript at 333.

[51] *Id.* at 334.

[52] *Id.*

[53] Transcript at 334.

[54] *Id.* at 340 and 341.

[55] *Id.* at 341.

appeal. However, he further testified that his medical records show he was hospitalized from February 10 to March 10, 1989, and the Appeals Council decision was issued on December 16, 1988.[56] Thus, Fermin was hospitalized for approximately the last six days of the sixty day appeal period. Fermin testified that although he had been declared incompetent prior to 1981, he filed the 1987 application for benefits and pursued it through the administrative process.[57] Fermin stated that his declared incompetency did not affect his ability to understand his right to appeal.[58] He admitted that he did not file an appeal of the Appeals Councils' 1988 decision was because of hospitalization for alcoholism and that he did not pursue the appeal after the hospitalization ended because he believed it was barred by the statute of limitations.[59]

The Court concludes that ALJ's assessment of Fermin's competency is supported by substantial evidence. Therefore the ALJ did not err in finding Fermin competent to understand the procedures surrounding his 1987 application for benefits and that the 1987 application should not be reopened.

## B. The ALJ's finding regarding military service was in error

The ALJ found that prior to February 1995, the Social Security Administration was prevented from using

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[56] *Id.* at 344.

[57] *Id.* at 345.

[58] *Id.* at 346.

[59] *Id.* at 354.

Fermin's military service to award retirement benefits because the military service was being used by another government agency to calculate a survivor's benefit for plaintiff's late wife.

Section 404.1342 of the Code of Federal Regulations provides:

> You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determine[d] by a Federal agency or an instrumentality owned entirely by the United State[s] to be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on you[r] active service during the World War II period[.][60]

"You" is defined to include "a veteran, a veteran's survivor or a member of a uniformed service applying for or entitled to a social security benefit or a lump-sum death payment."[61] "World War period" is the time from September 16, 1940 through July 24, 1947.[62]

The record of the August 11, 1998 hearing reflects Fermin's admission that the Civil Service had previously used his military service.[63] In addition, Fermin admitted on his 1995 application for benefits[64] and on his 1987

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[60] 20 C.F.R. § 404.1343(c)

[61] 20 C.F.R. § 404.1302.

[62] *Id.*

[63] Transcript at 350.

[64] *Id.* at 441.

"Pre-1957 Military Service – Federal Benefit Questionnaire"[65] that his military service had been used to create his wife's survivor's annuity. There are also government agency documents in the transcript providing the same information.[66] The transcript further reflects that Fermin served in the military from March 1941 to September 1945 and from May 1946 to February 1947.[67] The Court concludes that substantial evidence supports the ALJ's finding that Fermin's World War II period military service had been used to establish his wife's survivor's annuity and that therefore, prior to his wife's death, the Social Security Administration was precluded from also using the military service to determine Fermin's own eligibility for retirement benefits.

To the extent Fermin can be construed to argue error in the ALJ's determination that Fermin was entitled to retirement benefits beginning in February 1995, the Court finds that substantial evidence supports the determination. A memorandum from Barbara Guidry, the Social Security Administration Hearing Officer Manager, to the ALJ states that:

> 3. The survivor's annuity option terminated the last day of the month in which Mr. Fermin's wife died.
>
> 4. As of the first day of the month following the month of Mrs. Fermin's death, Social Security can use Mr. Fermin's military service for

[65] *Id.* at 386.

[66] *Id.* at 201, 202, and 580.

[67] *Id.* at 577 and 579.

> both insured status and computation purposes.[68]

Therefore, the ALJ did not err in finding that beginning in February 1995, the Social Security Administration could use Fermin's military service to provide the quarters he needed to be eligible for retirement benefits.

### C. The ALJ failed to provide Fermin with proper notice of his rights.

Fermin argues that the ALJ failed to comply with 20 C.F.R. § 404.984(b)(1)[69] which provides that exceptions to an ALJ's decision on remand must be filed with the Appeals Council within thirty days of the date the claimant receives the decision.[70] Evidence provided by Fermin reflects that the ALJ attached to the decision a notice of rights which stated that any appeal of the decision had to be filed with the Appeal's Council within sixty days from the date the decision was received.[71] Fermin also provided a copy of his March 1, 1999 request to reopen the ALJ's December 3, 1998 decision.[72] Although the ALJ did not provide Fermin with the thirty-day notice required by § 404.984, the ALJ's notice effectively gave Fermin an additional thirty days for filing exceptions. However, even under the time frame provided by the ALJ, Fermin's challenge to the decision was made almost ninety days

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[68] *Id.* at 580.

[69] Docket nos. 21 and 28.

[70] 20 C.F.R. § 404.984(b)(1)

[71] Docket no. 21, exhibit 1.

[72] *Id.* at exhibit 3.

after it was issued. Fermin does not offer any explanation for why he was prevented from challenging the decision within the sixty-day limit stated by the ALJ. The Court concludes that the ALJ did not err by giving Fermin sixty days within which to challenge the decision.

### D. The Appeals Council erred in not reopening the December 3, 1998 decision

On March 1, 1999, Fermin sent the Appeals Council a letter[73] requesting that the December 3, 1998 decision be reopened based on a letter he had received from Norma J. Miller, Benefits Specialist for the United States Office of Personnel Management.[74] On October 23, 2000, the Appeals Council responded, "We have concluded that you did not file the exceptions timely in accordance with 20 C.F.R. § 404.94(b)(1)."[75] Fermin argues that the Appeals Council erred by refusing to reopen the decision. Upon consideration, however, the Court concludes that the Appeals Council construed plaintiff's request as a filing of exceptions to the ALJ's decision. To that extent, Fermin's letter was untimely even under the more liberal sixty-day time period afforded by the ALJ.

To the extent that Fermin filed a request to reopen the ALJ's December 3, 1998 decision, which he contends the Appeals Council denied, the Court concludes that the Appeals Council's October 23, 2000 letter cannot be fairly construed to have addressed such a request. Pursuant to

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[73] Docket no. 1, exhibit 2.

[74] *Id.*, exhibit 5.

[75] *Id.*, exhibit 1.

§ 404.988(a) of the Code of Federal Regulations, a request to reopen can be made for any reason "within twelve months of the date of the notice of the initial determination."[76] Clearly, Fermin's March 1, 1999 letter was filed within twelve months of the ALJ's decision. Thus, the Appeals Council's finding of untimeliness cannot refer to the request to reopen. The letter does not discuss Fermin's "new evidence" or literally deny the request to reopen. Nor is there any indication that a decision on remand cannot be reopened or that the October 23, 2000 letter was intended as a decision on such a request. For these reasons, the issue of whether the Appeal's Council erred in refusing to reopen the ALJ's decision is not currently before the Court.

## VII. MISCELLANEOUS MOTIONS

Fermin has filed a variety of motions, including a motion for summary judgment;[77] a motion for new hearing or for new trial in which plaintiff asks the Court to reconsider the District Court's April 20, 2001 Order,[78] as amended;[79] a motion to review defendant's lead counsel's application for admission to practice law[80] in which plaintiff asks the Court to determine if defendant's counsel committed perjury; a "Request for the Court to comply

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[76] 20 C.F.R. § 404.988(a).

[77] Docket no. 28.

[78] Docket no. 30. The motion is actually entitled "Plaintiff's Motion for New Hearing or Trial." However, because no hearing or trial has been had, the Court construes the motion to be one for reconsideration.

[79] Docket no. 31.

[80] Docket no. 40.

with Appendix 'C' Local Rule 4;"[81] a motion for sanctions;[82] and a "Motion for Leave to Waive 21 Days Requirement to the Amended Federal Rules of Civil Procedure Title 28, Rule 11(c)(1)(A)."[83] This section will briefly address each of these motions.

**Motion for Summary Judgment**

Fermin filed a motion for summary judgment arguing that the ALJ violated his legal right to an appeal by giving improper notice of the appeal deadline, that the ALJ's decision should have been reopened, and that the Commissioner fraudulently concealed the ALJ's decision from plaintiff. The first two arguments were addressed above and the Court concluded that the ALJ's notice had the effect of extending the time for filing an appeal and the issue of whether to reopen the ALJ's decision has not been decided by the Appeals Council. Therefore, the Court concludes that summary judgment should be denied as to the arguments that the ALJ gave improper notice and that the ALJ's decision should have been reopened.

With respect to issue of whether the ALJ's decision was fraudulently concealed from Fermin, the Court concludes there was no concealment. Although the ALJ's decision does not appear in the official transcript, Fermin received the decision and attached a copy as exhibit 4 to his complaint and as exhibit 1 to the motion for summary judgment. The Commission did not object to the use of

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[81] Docket no. 41.

[82] Docket no. 42.

[83] Docket no. 43.

these exhibits. Therefore, Fermin's motion for summary judgment should be *denied*.

**Motion for Hearing or for New Trial**

Fermin filed: a motion to compel defendant to insert missing pages into the transcript;[84] a notice of appeal of the undersigned's April 5, 2001 Order granting defendant's motion to file an answer and the transcript out of time;[85] and a motion for default judgment.[86] On April 10, 2001, the District Court denied Fermin's motion for default judgment[87] and on April 20, 2001, the District Court denied the motion to compel and the notice of appeal.[88] In the motion for hearing or new trial, as amended, Fermin has requested a reconsideration of the denials.[89] He argues that the basis for reconsidering the April 20, 2001 Order denying the motion to compel and the notice of appeal is the information contained in his motion for summary judgment.[90] Because the Court has concluded that the motion for summary judgment should be denied in its entirety, the Court *denies* the motion to reconsider April 20, 2001 Order.

With regard to the motion to reconsider the April 10, 2001 Order denying the motion for default judgment,

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[84] Docket no. 18.

[85] Docket no. 19.

[86] Docket no. 11.

[87] Docket no. 20.

[88] Docket no. 26.

[89] Docket nos. 30 and 31.

[90] Docket no. 30.

Fermin argues that the fraudulent concealment of the ALJ's decision justifies the motion.[91] As discussed above, the ALJ's decision was not concealed from Fermin. Therefor, the motion to reconsider the April 10, 2001 Order which denied the motion for default judgment should be *denied*. In sum, the motion for hearing or for new trial, as amended, in its entirety, is *denied*.

**Request for Court to Comply**

Fermin filed a notice of appeal of the undersigned's April 5, 2001 Order which allowed defendant to file an answer out of time.[92] A copy was erroneously forwarded to the Fifth Circuit and the notice was returned on May 17, 2001, for consideration by the District Court. However, the District Court also received a copy of the notice and on April 20, 2001, denied the notice of appeal.[93] Therefore, the request for the Court to comply is *denied*.

**Motion to Review Defendant's Lead Counsel's Application for Admission to Practice**

Fermin filed a motion asking the Court to review defendant's lead counsel's admission for practice which requests that the Court determine if defendant's counsel delayed plaintiff's case or committed perjury. The request cites a provision from "Local Rule Section III Attorneys Rule" AT-1(e)(1) and emphasizes the sentence "That I will

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[91] Docket no. 31 at 2.

[92] Docket no. 19.

[93] Docket no. 26.

use no falsehood nor delay any person's cause[.]"[94] Fermin offers an insufficient explanation for how or why he believes perjury was committed or that his appeal was delayed to the extent sanctions are appropriate. The motion to review defendant's lead counsel's application for admission to practice is *denied*.

**Motion for Sanctions and Motion for Leave to Waive**

Fermin seeks $5 million in sanctions against the Commission and his counsel, Mr. Winstanley F. Luke for: removing pages from the transcript; delaying the filing of an answer for 127 days; lying to the Court and causing the entry of the Orders of April 10 and April 20, 2001. Upon consideration, the Court concludes that Fermin has not established that the pages missing from the transcript, which are documents related to applications for benefits before 1987, were removed, deliberately or otherwise, by defendant or his counsel. As for the defendant's delayed answer and the allegation of perjury, defendant explained in various motions for extension of time and leave to file late[95] that the Social Security Administration was having difficulty assembling the transcript because of a backlog in the system in preparing transcripts and because Fermin has filed applications over approximately forty years and documents had to be obtained from various other government agencies. Therefore, the Court concludes that sanctions are not warranted and *denies* the motion for

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[94] Docket no. 40.

[95] Docket nos. 5, 7, 9, and 13.

sanctions.[96] Because the Court has considered and denied the motion within twenty-one days after it was served on defendant, the motion for leave to waive the twenty-one day rule applicable to the service, before filing, of motions for sanctions is *denied as moot*.

## VIII. CONCLUSION

In sum, because the ALJ's determination denying plaintiff disability benefits is supported by substantial evidence and correctly applies the relevant legal standards, plaintiff's complaint is **DISMISSED**[97] and the Commissioner's decision is **AFFIRMED**. Also, plaintiff's motion for summary judgment;[98] motion for hearing or for new trial"[99] as amended;[100] motion to review defendant's lead counsel's application for admission to practice law;[101] "Request for the Court to comply with Appendix 'C' Local Rule 4;"[102] motion for sanctions;[103] and "Motion for Leave to Waive 21 Days Requirement to the Amended Federal Rules of Civil Procedure Title 28, Rule 11(c)(1)(A)"[104] are

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[96] Docket no. 42.

[97] Docket no. 21.

[98] Docket no. 28.

[99] Docket no. 30. The motion is actually entitled "Plaintiff's Motion for New Hearing or Trial." However, because no hearing or trial has been had, the Court construes the motion to be one for reconsideration.

[100] Docket no. 31.

[101] Docket no. 40.

[102] Docket no. 41.

[103] Docket no. 42.

[104] Docket no. 43.

**DENIED**. Any other relief not expressly granted is **DENIED**.

**IT IS SO ORDERED.**

**ORDERED, SIGNED and ENTERED** this 23rd day of July 2001.

/s/ Pamela Mathy
**Pamela Mathy**
**United States Magistrate Judge**

**SOCIAL SECURITY ADMINISTRATION**

Refer to: TAHBS
454-24-9053

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

**316**

**October 23, 2000**

Frederick C. Fermin
13906 Norland Drive
San Antonio, TX 78232-4921

Dear Mr. Fermin:

Re: Frederick C. Fermin vs. Commissioner of SSA
U.S.D.C. for the Western District of Texas
Civil Action Number SA-97-CA-1269

We have concluded that you did not file the exceptions timely in accordance with 20 CFR 404.984(b)(1).

**What This Action Means**

Under Social Security Administration regulations 20 CFR 404.984(d), the Administrative Law Judge's decision is the final decision of the Commissioner after remand by the court.

**IF YOU DISAGREE WITH THE ADMINISTRATIVE LAW JUDGE'S DECISION**

The previous court order which remanded this case to the Commissioner ended the court's review of the prior decision. If you desire judicial review of the final decision after the court remand, you must commence a new civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty

(60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 1631(c)(3) of the Social Security Act (42 U.S.C. 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Counsel to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

/s/ Andrew E. Wakshul
Andrew E. Wakshul
Deputy Chair, Appeals Council